International Investment Policy and Development

For the first time, a broad public debate is under way in the European Union about the risks posed by companies' international investments. This debate began in summer 2013, when the EU and the US commenced their negotiations on a comprehensive free trade agreement. This is no coincidence, as liberalisation and protection of foreign investment are among the key topics in the negotiations on the Transatlantic Trade and Investment Partnership (TTIP). However, the reform debate not only concerns the EU and the US; it also has implications for all the third states with which the EU is negotiating trade and investment agreements, including developing countries. The debate has already led to an initial reform of European investment policy, although the ambition of this reform remains a contentious issue.

Following months of criticism of the TTIP's investment chapter – and especially the proposed Investor-to-State Dispute Settlement (ISDS) – from private citizens, political parties, trade unions and civil society organisations, the European Commission announced a "pause" in negotiations on this topic in March 2014 for the purpose of holding a public consultation. It also presented proposals for a reform of the investment protection and ISDS system at the same time. In November 2015, the Commission published the final version of its new approach on investment protection and investment dispute resolution. The Commission intends to embed its reformed approach not only in TTIP but in all ongoing and future EU trade and investment negotiations. It already forms part of the trade agreements with Vietnam and Canada, both of which are now at the ratification stage.

The current reform debate is also highly significant for the future development of international investment law, since the EU's Lisbon Treaty transferred the Member States' investment policy competence to the European Commission in 2009. However, there is no immediate prospect of comprehensive harmonisation of investment policy: the European Commission has only taken the first few steps along this path so far. Nonetheless, the harmonisation process will affect the 1,200 or so bilateral investment treaties (BITs) concluded by the EU Member States, mainly with developing countries and emerging economies. The reformed approach will thus have a considerable influence on the BITs, which the Commission is committed to replacing with European investment agreements in the long term. In parallel, the Commission is working with other countries to set up a permanent International Investment Court. The objective is that over time,

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the International Investment Court would replace all investment dispute resolution mechanisms provided for in EU agreements, EU Member States' bilateral agreements with third countries and in all investment treaties concluded between non-EU countries. There are doubts, however, about the need for this Investment Court and its prospects of coming to fruition.

The network of international investment agreements

Since the end of the Second World War, an extensive network of treaties that regulate transnational investment flows has come into being. Some of them aim to improve market access through trade liberalisation; others focus on protecting existing investments. According to the United Nations Conference on Trade and Development (UNCTAD), there are now around 3,250 international investment agreements (IIAs) in existence, of which the majority – around 2,920 – are BITs. Most countries have signed one or more BITs with other states. The first-ever BIT was signed between Germany and Pakistan in 1959. Germany is currently party to around 130 investment promotion and protection agreements, making it the country with the most BITs worldwide – a reflection of its export-oriented economy.

In parallel to the BITs, more and more bilateral and regional trade agreements, such as the North American Free Trade Agreement (NAFTA) between the US, Canada and Mexico, contain investment provisions. Since 2011, the Council of the European Union has given the European Commission various mandates for negotiating investment protection chapters in free trade agreements.

Mandates for the European Commission to negotiate investment protection chapters in free trade agreements

- June 2011: India, Canada and Singapore
- December 2011: Egypt, Jordan, Morocco and Tunisia
- November 2012: Japan
- June 2013: United States of America (TTIP)
- October 2013: Malaysia, Vietnam and Thailand
- October 2013: China (purely an investment agreement)
- March 2014: Myanmar (purely an investment agreement)
- May 2016: Mexico

Some WTO agreements contain provisions on investment as well; examples are the Agreement on Trade-Related Investment Measures (TRIMS) and the General Agreement on Trade in Services (GATS). In addition, there is the Energy Charter Treaty, which has been signed by 52 countries and entered into force in 1998. This multilateral treaty not only regulates energy-specific aspects of trade and transit but also ensures the protection of foreign energy investments. What is lacking at present, however, is a treaty which comprehensively regulates global investment flows. Initial attempts were made in the 1948 Havana Charter and in the negotiations on a proposed Multilateral Agreement on Investment (MAI) launched by the Organisation for Economic Co-operation and Development (OECD) in the 1990s. However, these attempts failed – not least, in the MAI's case, as a result of worldwide protests.

Motives for concluding BITs

The first BITs were typically concluded between industrialised and developing countries; it was only later that industrialised countries began to conclude treaties of this kind among themselves. The prime motivation for concluding these treaties was to protect investment from the expropriations which periodically occurred in developing countries from the 1950s onwards; examples are the nationalisations of Iran's oil industry, Chile's copper mines, and Cuba's sugar plantations. Developing countries often regarded it as their sovereign right to nationalise foreign-owned property if this was deemed to be in the public interest. Western industrialised countries, on the other hand, insisted on binding investment protection and prompt and adequate compensation in the event of an expropriation.

The BITs were the industrialised countries' response to the nationalisation waves, but developing countries were slow to sign these treaties during the early years. It was not until later, mainly in the 1990s, that more countries of the Global South were willing to commit to BITs. Their main interest in doing so was to prove their credentials as reliable places to do business, to attract inward investment, to create jobs, and to stimulate economic development. The assumed link between the BITs, higher investment and development has not been conclusively proven by empirical studies, however. The existence of BITs does not, in itself, motivate investors to commit funds to developing countries. Other conditions, such as resource availability, infrastructure, demand based on purchasing power and a reasonably high level of education must also be in place. Often,

International investment agreements: regulatory areas

Expropriation: Investment agreements limit the scope for governments to justify expropriations, and generally require prompt, adequate and effective compensation to be paid to investors. However, the calculation of the awards is often a contentious issue, focusing, for example, on how the real value of an investment is to be quantified and whether potentially lost profits may be factored in.

Indirect expropriation: Most bilateral investment treaties (BITs) define not only direct but also indirect expropriation as a possible violation of the treaty terms and as grounds for seeking redress. "Indirect expropriation" means government measures that can reduce the value of an investment, although the legal title to the investment is not affected. It can include numerous actions that are justified in the public interest, such as new legislation whose purpose is to protect the environment or health.

Fair and equitable treatment (FET): This is now the most frequently invoked standard of investment protection in international investor-to-state arbitration. FET provisions have been construed by investment tribunals in various judgments as including a right to a "stable and predictable" regulatory environment, allowing investors to seek compensation if their "legitimate expectation" of a stable business environment is adversely affected by regulatory measures and conferring a right to challenge changes to the law or new regulations.

Free movement of capital: Almost all investment treaties contain provisions on the free movement of capital, the purpose being to enable foreign investors to transfer their revenue (profits, interest or charges) abroad in freely convertible currency. However, unlimited capital outflow can pose substantial risks to the host countries' balance of payments and financial stability. BITs which guarantee free movement of capital without any restrictions therefore pose particular risks.

Umbrella clause: This imposes a requirement on the host state to observe all investment obligations entered into with investors from the other state. This sounds quite innocuous, but it can be highly problematical. It means that a straightforward breach of a contract with a private company from overseas is automatically a breach of the BIT, allowing the company to seek redress through international arbitration.

Performance requirements: Investment agreements can prevent governments from coupling investment to certain performance requirements which in some cases have substantial development policy significance. They can include provisions requiring the use of local primary products (known as local content requirements) or local labour, or provisions on technology transfer. Others may restrict imports in order to avoid an excessively high trade deficit, or limit exports in order to ensure the supply of goods – such as staple foods – to local markets.

Dispute settlement: Investment agreements can offer various dispute settlement options. They include amicable settlements through advisory, conciliation and arbitration services, access to the host country's courts, and case-specific convening of international arbitration tribunals. A decision to convene a tribunal can be taken between states or between private investors and states; however, investor-to-state arbitration is particularly contentious. Nonetheless, this form of dispute settlement is the option provided for in most BITs and, increasingly, in the more recent free trade agreements.

investors prefer to focus on countries that have already embarked on a path towards growth – whether or not BITs are in place. Brazil, for example, whose National Congress has not ratified any of the BITs negotiated by the Government in the 1990s, has nonetheless attracted substantial foreign investment.

Investor-to-State Dispute Settlement: a flawed mechanism

A key innovation introduced in the BITs is that when disputes arise, overseas companies have the right to bring a case before an international arbitration tribunal, thus circumventing the host country's ordinary jurisdiction. There are various

ISDS mechanisms in operation, each with different rules. Many of these mechanisms apply the relatively flexible rules established by the United Nations Commission on International Trade Law (UNCITRAL). More formalised proceedings are conducted in forums such as the International Centre for Settlement of Investment Disputes (ICSID) based at the World Bank in Washington, the International Chamber of Commerce (ICC) in Paris, the Stockholm Chamber of Commerce (SCC) and the Permanent Court of Arbitration (PCA) in The Hague.

Companies have been utilising these international arbitration procedures with increasing frequency since the late 1990s. According to UNCTAD, the total number of known treaty-based cases had reached 696 by the end of 2015, compared with only around ten known cases at the start of the 1990s. The actual figure may be higher still, as some arbitration forums do not publish details of their cases. In more than two-thirds of cases, governments from the Global South were in the dock. The majority of cases – 62 per cent – were dealt with by the ICSID, while around a quarter were handled in accordance with UNCITRAL Arbitration Rules. In total, over the years, 107 governments have been respondents in one or more cases brought by investors, and the majority of all known cases were brought against developing countries and emerging economies. Argentina is the most frequent respondent by a considerable margin, with 59 cases against it, followed by Venezuela with 36.

The rapid increase in the number of investor-to-state cases has sparked intense debate about the weaknesses of this system. Numerous problems have been identified, including, first and foremost, the risks that the system poses to state governance. The possibility that international tribunals will award investors substantial compensation puts governments under pressure to forego measures that are in the public interest but restrict investors' business activities (this is known as the chilling effect, as it "freezes" regulatory activities). And indeed, these claims often involve exorbitant amounts of money.

By far the highest compensation payment ever awarded in an international arbitration procedure was made against Russia in July 2014 and totalled USD 50 billion. The Permanent Court of Arbitration (PCA) in The Hague ruled that the tax demands and other procedures imposed by Russia against Yukos Oil Company, which resulted in its dismantling, breached the Energy Charter Treaty. In second place is the payment awarded by an ICSID tribunal against Ecuador in 2012, amounting to USD 1.7 billion plus interest and legal costs. These sums are a massive financial burden for many, often already over-indebted countries, and are therefore a major threat.

Companies base their claims on the provisions of the BITs, which are often imprecise and open to interpretation. The BITs often contain a broad definition of the term "investment" that covers all forms of asset transfer, not only the purchase of real estate or shareholdings but also the acquisition of securities, patents, concessions or licences. Many BITs also apply a very broad interpretation of the term "indirect expropriation", which has prompted some tribunals to regard legitimate government measures – such as the refusal to grant an operating licence for a hazardous waste disposal site in Mexico – as a breach of the BIT. Some tribunals construe the equally imprecise principle of "fair and equitable treatment" as including a right of investors to a "stable and predictable business environment", opening the way for democratically adopted legal amendments to be treated as potential violations of a BIT.

Other weaknesses in ISDS mechanisms relate to their legitimacy. In most cases, three arbitrators are appointed to the panel in these private proceedings; each party appoints an arbitrator, with the third chosen by mutual consent to preside over the proceedings. Many arbitrators are legal professionals employed by law firms and are often involved in several cases simultaneously, performing different roles, either as an arbitrator or as counsel for one of the parties.

There is also very little transparency in the way in which the tribunals work. The parties can refuse to publish all the documentation relating to the case, even if there is substantial public interest in the matter. There is also considerable inconsistency in the findings of these tribunals, with a bias towards corporate interests. Furthermore, the international arbitration forums usually offer no opportunity for appeal. The decisions are generally binding, final and immediately enforceable. The ICSID alone offers an annulment option, but this only applies if a serious violation of the law has occurred, such as proven corruption on the part of a member of the tribunal.

From a development perspective, one of the most serious flaws relates to the substantial imbalance between the rights and the obligations of foreign investors. Investment agreements grant sweeping rights to investors, based on protection provisions which offer considerable scope for interpretation. Rarely, however, do they establish any corresponding

obligations, such as a requirement to comply with international environmental, social or human rights standards. Making matters worse, only foreign investors may bring cases before the tribunals. National governments, domestic companies and private individuals have no access to these dispute settlement mechanisms. The victims of human rights abuses by transnational corporations are thus also excluded from this form of redress.

Investor-to-state disputes: a business model for law firms and financial speculators

The number of investor-to-state cases has increased sharply in recent years, not least because some international law firms now specialise in the extremely lucrative investment arbitration business. With law firms charging fees of up to 700 euros an hour, the legal costs often run into millions. As a consequence, it is a well-established practice for law firms to actively encourage companies to bring an action against governments.

If companies do not have to pay any legal costs, bringing an action is an even more tempting prospect. The companies concerned can turn to providers of capital for legal markets, which cover all the costs of the case and thus reduce the financial risk to zero. If the case is successful, the capital provider then claims a substantial proportion – generally 20-50 per cent – of the compensation awarded. This type of funding arrangement for international investment cases is provided by companies such as the UK's Burford Capital and Omni Bridgeway in the Netherlands.

Capital providers for legal markets are increasingly attempting to influence the arbitration system in their own interests, by offering their clients not only funding but also advice on the strategic approach and negotiating tactics to be applied in the proceedings and on the choice of experts. They sometimes find it worthwhile to accept cases not only for their profitability but also because certain procedural amendments or reasons for judgments may be useful to them in future disputes.

Examples of investment disputes

The following examples illustrate some of the risks posed to states by the international investment agreements and Investor-to-State Dispute Settlement regimes.

Occidental Petroleum vs. Ecuador

The background to this dispute, which resulted in the second largest arbitral award ever made by an arbitration panel, was Ecuador's decision to cancel the oil concession held by US-based Occidental Petroleum after Occidental broke the terms of its contract by transferring a 40 per cent stake in its Ecuadorian projects to another company without the approval of Ecuador's Government. The arbitration panel held that as a result of Ecuador's decision, Occidental had suffered "indirect expropriation" and that Ecuador had failed to accord "fair and equitable treatment". The total costs, consisting of compensation amounting to USD 1.77 billion plus interest and legal costs, run to an estimated USD 2.4 billion – equivalent to the country's annual health spending for seven million Ecuadorians. This case illustrates the high financial risks that BITs pose to resource-rich developing countries that are now attracting sometimes substantial direct investment in their extractive industries.

Suez vs. Argentina

The Government of Argentina adopted various measures in response to the major economic crisis in 2001/2002, including price freezes for services such as water, gas and electricity. This prompted a claim by various foreign companies, including the water company Suez, which was incorporated in France and belonged to a consortium which, in 1993, had invested in a concession for water distribution and wastewater treatment services in the city of Buenos Aires. In its request for arbitration, submitted to the ICSID in 2003, the consortium described the price controls as a breach of "fair and equitable treatment". This was upheld by the ICSID tribunal in 2010. In April 2015, the tribunal awarded the companies compensation of USD 405 million. As the tribunal's decision shows, not even government measures adopted in an emergency in order to safeguard a basic public utility are safe from successful claims.

Italian investors vs. South Africa

In 2006, Italian investors in South Africa mounted an international arbitration procedure against the South African Government before the ICSID. These Italian investors held large investments in South Africa's mining industry via a Luxembourg-based holding company. Their claim challenged the Mineral and Petroleum Resources Development Act (MPRDA), which came into force in 2004 and established a new framework for the allocation of extraction licences. This new framework aims inter alia to implement key elements of the South African Government's Black Economic Empowerment policy and the constitutional goal of redressing historical,

social and economic inequalities. Therefore it includes an obligation to increase the equity share of "Historically Disadvantaged" South Africans in mining companies to 26 per cent. The Italians argued that these amendments to the legislation amounted to expropriation and that they had been denied fair and equitable treatment. In early 2010, the parties reached an out-of-court settlement, with South Africa waiving its requirement for the Italians to sell 26 per cent of their shareholdings to South Africans. This case shows that even without a decision by a tribunal, governments can still be prevented from adopting certain measures – an out-of-court settlement suffices.

Germany vs. the Sawhoyamaxa indigenous community

Around 100 families belonging to the Sawhoyamaxa indigenous community in Paraguay have been battling for more than two decades to recover part of their ancestral lands, which was illegally expropriated in the late 19th century. The title to the lands is currently held by Heribert Roedel, a German citizen. In 2000, the Senate in Paraguay rejected a request for the expropriation of the land and its return to the Sawhoyamaxa community, on the grounds that this was blocked by the BIT between Germany and Paraguay. However, the senators ignored the fact that the BIT would permit expropriations that were deemed to be in the public interest; such expropriations would be subject to compensation. Germany, too, refused to send a formal letter of clarification stating that the BIT does not constitute an obstacle to an expropriation that is deemed in the public interest. In 2006, the Inter-American Court of Human Rights finally found in favour of the indigenous community and ordered Paraguay to return the land to the Sawhoyamaxa. However, the President of Paraguay did not sign an expropriation law to return the lands until 2014. Heribert Roedel also delayed vacating the land despite having lost two petitions for the law to be overturned on the grounds of unconstitutionality. This case shows how a BIT can be misused in order to obstruct the fulfilment of human rights obligations.

Current reform efforts

Bad experience with investment agreements and Investor-to-State Dispute Settlement but also persistent criticism from civil society have prompted numerous governments to look again at their investment policies. At least 110 countries have reviewed their investment policies since 2012. The reforms vary in scope and ambition, ranging from straightforward clarification of certain treaty clauses, the reform of the arbitration procedures and the development of alternative forums, to consensus-based renegotiation or unilateral cancellation of BITs.

The US, Canada and Colombia, for example, have clarified some of the clauses in their model BITs in order to create greater regulatory scope. Other governments, including Brazil, India, Indonesia and Egypt, have developed model BITs of their own for the first time as a framework for future treaty negotiations. Some regional groups have also adopted model BITs, including the Common Market for Eastern and Southern Africa (COMESA) and the Southern African Development Community (SADC).

Some of these templates include highly innovative features. India's model, for example, states that an investor may not submit a claim to an international tribunal before domestic remedies have been exhausted. India has also drawn up a long list of measures that will be completely exempted from arbitration, including those relating to state subsidies, government procurement, taxation, and compulsory licensing of drugs covered by patent protection. Brazil's model BIT does not provide for ISDS at all, dealing only with state-to-state arbitration. Brazil recently signed BITs with various countries, including Angola, Mozambique and Mexico, based on this model. None of these BITs includes provisions on the controversial mechanism of investor-to-state arbitration.

Several countries, including Bolivia, Ecuador, Venezuela, South Africa and Indonesia, have already cancelled BITs with other states. India recently served notices to 57 countries, including Germany, seeking termination of bilateral investment treaties and will now negotiate new treaties based on the model BIT. South Africa, meanwhile, has announced that it does not necessarily intend to negotiate new agreements with every country whose BIT has been terminated by the Government. It will take this step only if there are compelling economic grounds for doing so.

After Bolivia, Ecuador and Venezuela withdrew from the ICSID, the Union of South American Nations (UNASUR) began to develop its own regional arbitration centre for investment disputes. The final phase of negotiations started in early 2016. Once approved by the 12 UNASUR governments, the centre will emerge as an alternative to the ICSID, whose judgments have adversely affected many South American countries.

These initiatives are supported by UNCTAD which, in its Investment Policy Framework for Sustainable Development, published in 2012, calls for reforms that would enable states to preserve political flexibility and impose obligations on companies, and to limit or remove the option of initiating investor-to-state arbitration. UNCTAD also points out that a growing number of the BITs signed in the 1990s are due to expire in the near future (around 1,600 will expire by 2018), offering the opportunity to correct errors through the amendment or cancellation of the agreements.

The EU's new approach, which the European Commission calls the Investment Court System (ICS), lags far behind the ambitious reforms under way in the Global South. In contrast to the situation under the existing systems, the parties to ICS proceedings will no longer be free to select three arbitrators as they see fit; instead, panels will be chosen from a group of publicly appointed judges. The Comprehensive Economic and Trade Agreement (CETA) with Canada, for example, envisages the establishment of a permanent Tribunal of 15 members, while under the terms of the EU-Vietnam FTA, the Tribunal will comprise nine members. A further innovative feature is that decisions may be appealed before an "Appeal Tribunal" (EU-Vietnam FTA) or an "Appellate Tribunal" (CETA). Both agreements also provide for future negotiations on the establishment of a multilateral investment tribunal, although it is still uncertain whether and when this will happen.

Despite these innovations, many lawyers and human rights experts are of the opinion that the European approach fails to address the flaws inherent in the existing ISDS regimes. In his new report, Alfred de Zayas, United Nations Independent Expert on the promotion of a democratic and equitable international order, for example, calls for the abolition of the ICS, for several reasons. The EU approach, he says, is still a one-way jurisdiction, with states having no standing to sue and no obligations being imposed on investors. It is still possible to arrive at expansive interpretations of ill-defined legal terms, and the burden of proof has been reversed to the detriment of states. Governments are required to demonstrate that their measures are "legitimate" and not "excessive". The chilling effect, which may deter states from adopting legislation that is in the public interest, is reinforced while those who suffer harm as a consequence of foreign investment are denied access to justice from the ICS.

Conclusions

In view of the numerous problems affecting international investment policy, developing countries should be encouraged to expand their policy-making scope to regulate foreign investment with a view to reducing poverty and promoting sustainable development. Developing countries should view the imminent expiry of the BITs as an opportunity to initiate a comprehensive reform of their investment policy, and should give serious consideration to cancelling or reviewing unfavourable treaties. In parallel, support should be given to efforts being made by civil society in these countries to subject their government's actions to democratic control.

The EU and its Member States should make it easier for developing countries to require European investors to comply with human rights and environmental standards. It must be recognised that the long-neglected responsibilities of private investors are as important as their rights. Germany and the EU, in particular, should work actively to end the widespread lack of transparency in investment negotiations. Not only companies but all potential stakeholder groups should have a voice on investment policy. Greater transparency could help to ensure that unreasonable investor demands are excluded from the outset. By contrast, negotiations that take place behind closed doors, even though they relate to matters of public interest, weaken democracy in North and South alike.

The circumvention of countries' ordinary jurisdiction through recourse to arbitration tribunals that lack transparency impedes the establishment of rule-of-law institutions, especially in developing countries. The excessively high costs of these proceedings and the exorbitant compensation payments pose a risk that the countries concerned will become over-indebted and will refrain from adopting essential regulatory measures. The preferred option, therefore, is to ensure that parties seek redress through the national courts or, in certain circumstances, through transparent intergovernmental dispute settlement mechanisms.

In countries with a well-functioning legal system, it is neither necessary nor useful to offer companies the additional option of investor-to-state arbitration as a means of seeking redress. In the interests of subsidiarity, investment protection agreements should be redesigned so that their dispute settlement provisions merely supplement domestic law. Investors would then only have recourse to arbitration tribunals

if the domestic courts were unwilling or unable to deal with the matter.

With the transfer of competence to the EU and the desired harmonisation of European investment policy, there is an opportunity for reform. Before adopting new trade and investment agreements such as the TTIP, the Community's investment policy should be reframed. We urge those responsible to ensure that it is coupled to environmental, development and human rights goals.

Viewed in that light, the EU's reformed approach, namely the Investment Court System, is still inadequate.

Furthermore, Germany and the EU should advocate for foreign investors' human rights obligations to be internationally enforceable. The UN Human Rights Council's initiative on elaborating an international legally binding instrument on Transnational Corporations and Other Business Enterprises with respect to human rights can contribute substantially to making foreign investor obligations mandatory in investment agreements in future. The German Government should therefore actively support this initiative.

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